No. 11,147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COFFIN REDINGTON COMPANY (a corporation),	
	Appellant,
vs.	
CHESTER BOWLES, Administrator, Office of Price Administration,	
	Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

INTRODUCTION.

Before discussing the efforts of the Administrator to refute the Company's specifications of errors, we believe it fitting to comment briefly upon his unmistakable plea to this Court for a gracious reception of his case.

On page 6 of brief for appellee, there is a quotation from the opinion in *Bowles v. Stafford,* 56 Fed. Supp. 976: "This type of case is difficult of proof by the Administrator." That terminology was employed

in contrasting a tying-agreement complaint with the more common price-ceiling complaint (pages vii and viii in Appendix of appellant's opening brief). The Administrator has at his disposal all necessary investigators and attorneys, and he has full authority to subpoena any and all records desired. If the Company had actually violated the Maximum Price Regulation, as charged, the proof would not have been difficult. If in this proceeding the Administrator, after reviewing the record, has found any difficulty of proof, should he not begin seriously to question his original predetermination of the Company's guilt?

On page 7 of brief for appellee, there is the obvious attempt to lessen the Administrator's burden of proving a tying agreement by the improvisation of an artificial distinction between the terms "compelling" or "forcing" a commodity on a buyer and a "must" proposition with reference to the buyer. This matter will be more fully discussed under second specification of error, post.

Finally, on pages 7 and 11, respectively, of brief for appellee, this Court is asked to look beyond the record in an effort to find the non-existent: "It is therefore necessary that the obvious reluctance of plaintiff's witnesses to testify against the defendant be borne in mind in analyzing the evidence presented to the trial court so that the same may be correctly interpreted."; "That these witnesses were hostile to the Government (for the economic reasons previously stated) is beyond question." There is nothing in the record to indicate that the Administrator's witnesses

were reluctant or hostile; on the contrary, the record discloses that they answered the questions of Administrator's counsel with readiness and willingness, however disappointing their answers may have been to him. *Counsel* may have been reluctant to question them further and may have been hostile toward the witnesses when their testimony was given, but *his* personal feelings should not be imputed to the witnesses.

FIRST SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN FINDING THAT THE ALLEGATIONS CONTAINED IN PARAGRAPH 4 OF THE COMPLAINT WERE TRUE, NAMELY, THAT THE COMPANY HAD SOLD DISTILLED SPIRITS AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.

The Administrator concedes the correctness of the Company's position:

> "It was stipulated between the parties at the trial that * * * none of the individual commodities were sold at a price in excess of ceiling price for each such commodity (R. 26-27)". (Brief for Appellee, pages 2 and 3).

SECOND SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN FINDING THAT THE ALLEGATIONS CONTAINED IN PARAGRAPH 5 OF THE COMPLAINT WERE TRUE, NAMELY, THAT THE COMPANY HAD SOLD WHISKEY ONLY ON CONDITION THAT THE PURCHASER ALSO BUY OTHER BEVERAGES AND THEREBY HAD SOLD WHISKEY AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.

Paragraph 5 of the complaint charged that the Company sold whiskey only on condition that the purchaser also buy other commodities and thereby sold whiskey at over-ceiling prices (R. 3). In order for the Administrator to substantiate this allegation, he was required to prove, first, that there was a tying agreement, and second, that the tying agreement was illegal in that it required the purchaser to pay more than the ceiling price of the whiskey for the whiskey and other commodities.

Edelmann v. Bonded Liquors, Inc. (cited on page 4 of brief for appellee):

"From the foregoing, the Court concludes that the provisions above quoted forbidding evasions of the regulations prohibit the practice here involved, by which a seller, in effect, compels the purchase of one commodity as a condition of the sale of another product for which a ceiling price has been established, and by which the seller demands a *total price for both above the price established for the commodity regulated.*" (Emphasis supplied.)

Brown v. Banana Distributors, 52 F. Supp. 804 (cited on page 4 of brief for appellee):

"Any type of tying agreement is a violation of the act *if used as a means of evasion* of the maxi-

> mum price allowed by the maximum price regulation, but *it must be made to appear that the practice is so used* in order to set up a valid charge of violation of the act. * * * *It is the evasion of maximum prices, not the method, which is prohibited by this section."* (Emphasis supplied.)

Assuming, for the sake of argument, but not conceding, that the Administrator had been able to prove the existence of a tying agreement, there still is no evidence in the record tending to prove that such agreement was illegal—that any retailer paid more than the whiskey ceiling price for the whiskey and other commodities that he purchased. The Administrator failed to produce any evidence as to the ceiling price of whiskey or as to the aggregate sales price of the whiskey and other commodities. Under these circumstances, there could be no possible finding of a sale of whiskey over its legal ceiling price. We submit that, upon this single point, the finding of the trial court set forth in the second specification of error must fall.

In this connection, the statement of the Administrator on page 2 and again on page 14 of brief for appellee, to the effect that the parties stipulated at the trial that the total price charged for the whiskey and the other commodities exceeded the maximum price permissible for the whiskey, does not conform to the facts. An examination of pages 26 and 27 of the record (claimed by the Administrator to support his statement) reveals that the only stipulation made or

intended was to the effect that each commodity sold was sold *within* its ceiling.

Without in any way relinquishing our position that the Company's second specification of error is well taken for the reason stated above, we pass to the next point which the Administrator was required to prove in order to justify the finding made with reference to paragraph 5 of the complaint, viz., that there was a tying agreement.

What is a "tying agreement"? Paragraph 5 of the complaint alleges that the Company sold whiskey "only on condition" that the purchaser also buy other commodities. This allegation is based upon Section 7.8 (b) of Maximum Price Regulation No. 445 (reproduced verbatim on page 2 of brief for appellee), which, without defining same, condemns an evasion of price ceilings by "tying agreement".

In *U. S. v. Armour & Co.*, 50 Fed. Supp. 347, the indictment alleged that the defendants sold butter "and as a condition of the sale of said butter the defendant did unlawfully, knowingly and wilfully demand, require and compel" purchasers to buy another commodity. The court stated:

> "It is, therefore, my opinion that a tying agreement, by which a seller 'demands, requires and compels' the purchase of one commodity as a condition of the sale of another product * * * is an evasion."

In *Brown v. Banana Distributors,* 52 Fed. Supp. 804, the term "tying agreement" was used in the sense of "compulsion to purchase another commodity

with the regulated commodity" and "refusal to sell the regulated commodity except in conjunction with the other commodity."

In *Bowles v. Stafford*, 56 Fed. Supp. 976, where a tying agreement was alleged, the theory of the Administrator was that the purchase of one item was "required" by the seller.

Similarly, in *Edelmann v. Bonded Liquors, Inc.*, quoted by the Administrator on page 5 of his brief, the court said that the plaintiff in order to obtain whiskey was "required" to purchase another commodity.

Since it is charged that, by tying agreement, the Company sold whiskey only on condition that the purchaser also buy another commodity, it follows that it is incumbent upon the Administrator to prove that the purchaser was required or compelled or forced to buy the other commodity. At no time during the trial did the Administrator attempt to escape his rightful burden of showing "compulsion" or "force" and, now that the record is before this Court and contains nothing to substantiate "compulsion" or "force", he asks to be relieved of that burden—he pleads (page 7 of brief for appellee) that " * * * the word 'force' when here used has a different connotation than that normally given it". The Administrator, having made a charge, should be required to substantiate it.

The Administrator concedes that there was no evidence that the Company's salesmen expressly in-

formed their customers of the terms of the alleged tying agreements (pages 7 and 8 of brief for appellee). The failure of counsel for the Administrator to prove the contrary has required the Administrator's special appellate attorney to hazard various explanations—"economic background", "innuendo". These explanations are as theoretical as is the Company's alleged violation of the Maximum Price Regulation.

There is set forth in the appellant's opening brief a concise but accurate statement of the economic situation prevailing during the year 1944. The Company, by reason of its tremendous drug business, was not required to realize financially upon its lesser liquor business. Retailers could purchase liquor from some thirty competing wholesalers in the San Francisco Bay area, and it was important that the Company maintain the goodwill of its retailers. The rationing plan instituted by the Company applied to all of the commodities mentioned in the record, whether whiskey or otherwise; the plan was conceived and executed for the benefit of the retailers; the plan provided for new customers as well as old (this fact does not appear in the record because the occasion did not arise for a question to which it would have been responsive; however, the Administrator purports to argue to the contrary on page 6 of brief for appellee and we volunteer the statement to preclude the possibility that our silence be misconstrued).

The "force by innuendo" theory advanced by the Administrator on pages 8 through 11 of brief for appellee is apparently an innovation to Anglo-Ameri-

can jurisprudence. Under this proffered doctrine, the ancient art of salesmanship is revolutionized: the retailer must initiate the selling transaction; the wholesaler is not permitted to suggest items of merchandise; the trained salesman who has learned his stock and his retailer's requirements is replaced with a robot order-taker; for the wholesaler and his salesman to conduct themselves otherwise would be to submit themselves to the "force by innuendo" weapon. We do not believe that the time has yet arrived when the wholesaler cannot lawfully *sell* his products to the retailer. We believe that the wholesaler still has the right to offer all or any portion of his stock to the retailer, to suggest commodities which he believes the retailer can sell to the public, to mention one commodity before mentioning another. We conclude that, if there is to be any allusion to the term "innuendo" it should be confined to the arguments appearing in brief for appellee.

The final, futile attempt by the special appellate attorney to support the charge of the Administrator is found on page 11 of brief for appellee. The surprising statement is made that three of the Administrator's witnesses "admitted while testifying that they had previously given signed statements * * * to the effect that they had purchased liquor items other than whiskey from the defendant in order to be able to obtain whiskey." We have searched the record in vain to find the basis for the foregoing assertion. One witness, Mrs. Parker, testified that she signed "something" (R. 32) but she did not testify as to the con-

tents of the "something". The testimony of another witness, Mr. Ferroni, does not even disclose that he made a prior statement, inconsistent or otherwise (R. 38-9). The third witness, Mr. Lasser, testified that he signed a statement referring to a wholesaler *other than the Company* (R. 56-7). We submit that the Administrator's brief-writer has taken unwarranted liberties with the truth in making the foregoing assertion.

In view of the fact that no witness did testify that he had made a prior inconsistent statement, there is little reason to discuss the material contained in the footnote on page 13 of brief for appellee, where the comment is made that there is a growing tendency among the courts to treat the admission of a witness on the stand, to the effect that he has made a prior statement outside of court which is inconsistent with his testimony in court, as substantive evidence of the truth of the prior inconsistent statement. Suffice it to say that counsel for the Administrator does not claim this to be the governing rule; nor could he properly do so, for proof of inconsistent statements of a witness can be introduced and considered only for the purpose of impeachment and not as substantive evidence of the truth of the matter stated:

> *Southern Ry. Co. v. Gray,* 241 U. S. 333, 60 L. Ed. 1030;
>
> 70 *Corpus Juris* 1153.

It should be noted that, in the case cited by the Administrator, *Di Carlo v. United States,* 6 F. (2d) 364, the court was merely confirming the rule that a party

should be allowed to impeach his own witness, and the portion of the opinion quoted was simply the court's answer to the reasons usually advanced for not allowing such practice and the court's recognition of the danger of a jury accepting as true the very same facts as the Administrator is asking this Court to consider.

On page 13 of brief for appellee, a studied effort is made to cast doubt upon the ability of retailers to return commodities purchased from the Company. One retailer particularly testified that she knew that she could make the returns (R. 34). The Manager of the Liquor Division (R. 85-6) and the Vice President in charge of the Drug Division (R. 106) testified that many returns had actually been made by retailers. Plaintiff's Exhibit No. 2, a memorandum of August 4, 1944, directed to the salesmen in the Drug Division, informed them that unrestricted items (items on the "open list") were never to be sent to retailers arbitrarily and that, with reference to restricted items which had been sent to retailers on the allocation basis, they could be returned if desired (R. 112). Plaintiff's Exhibit No. 3, a similar memorandum of June 22, 1944, to which the Administrator has alluded (page 13 of Brief for Appellee), is not in conflict with the foregoing; had trial counsel seen fit to question the author of the memorandum (Mr. H. J. Haaf, who was available in court), he would have been apprised of the full and complete State Board of Equalization ruling and would have discovered that it applied only to *final* sales of liquor—not to sales made *on approval,* as was the case with the liquor offered by allocation to customers of the Drug Division.

CONCLUSION.

In this injunction proceeding, the burden was upon the Administrator to establish the Company's alleged violation; the evidence of the Administrator was required to be clear, undisputed, convincing:

Bowles v. Cohn, 57 F. Supp. 306 at 307.

The evidence demonstrates that no commodity was sold above its individual ceiling price, and that no commodities were the subjects of a tying agreement. There is no evidence to show that any retailer paid more, for whiskey and other commodities, than the ceiling price of the whiskey.

Therefore, we respectfully ask this Court to reverse the judgment of the District Court and to render final judgment in favor of the Company.

Dated, San Francisco, California,
April 1, 1946.

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